

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

April 29, 2008 Session

STATE OF TENNESSEE v. BRANDON PAUL GRAHAM

Appeal from the Criminal Court for Hamblen County
No. 07CR206 John Dugger, Jr., Judge

No. E2007-02046-CCA-R3-CD - Filed August 27, 2008

The defendant, Brandon Paul Graham, pled guilty to criminal responsibility for conduct of another for aggravated burglary, a Class C felony, and facilitation of robbery, a Class D felony. For the aggravated burglary, the Hamblen County Criminal Court sentenced the defendant to three years, with ninety days to be served in the county jail followed by release to community corrections and house arrest. For the facilitation of robbery, the court sentenced the defendant to two years, with ninety days to be served in the county jail followed by release to community corrections and house arrest. The court ordered the defendant to serve the sentences concurrently. The court denied the defendant's application for judicial diversion and denied defendant's request for full probation. In this appeal, the defendant raises two issues: (1) whether the trial court erred by denying the defendant's application for judicial diversion and (2) whether the trial court erred by not sentencing the defendant to full probation. We affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which THOMAS T. WOODALL and ALAN E. GLENN, JJ., joined.

Robert R. Kurtz, Knoxville, Tennessee, for the appellant, Brandon Paul Graham.

Robert E. Cooper, Jr., Attorney General and Reporter; Renee W. Turner, Assistant Attorney General; C. Berkeley Bell, Jr., District Attorney General; and Kevin D. Keeton, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

This case relates to the defendant's participation in the burglary and robbery of Vickie Guley on January 24, 2007. The defendant and three co-defendants entered the victim's home and planned to rob her. Co-defendant Micah Couch knew the victim and unlocked the rear door of the victim's house to allow the other three into her house. Co-defendant Matthew Bunch ordered the victim to the floor and held a knife to her. Co-defendant Richard Davis and the defendant searched the victim's house and took two pill bottles that they later discovered contained screws and penicillin. The defendant acknowledged that he assisted the others and that he entered the house.

The trial court accepted the defendant's guilty plea and held a hearing on the issue of judicial diversion. At the judicial diversion hearing, the defendant testified that he did not know co-defendant Matthew Bunch had a knife when they entered the victim's house. Defendant said he felt horrible about what he had done. He said he was not working at the time of the incident.

The defendant's friend, Jessica Clark, testified that she had known the defendant for about seven years. She said that the defendant was very respectful and that his participation in the incident did not fit with his character. She said the defendant had learned from this incident and would never make a mistake like it again.

After hearing the testimony and arguments by counsel, the trial court denied judicial diversion. The trial court stated:

Judicial diversions are something this Court very rarely grants. I'm starting off with that general rule. My predecessor granted none, zero, but I have granted a very few. And when you look at the factors under *State vs. Parker*, 932 S.W.2d 945 and 958, the accused's amenability to corrections. That's a big one in this case. I'm just – I read these letters and, of course, it's mostly from his family and, you know, he's a good guy, but I mean we're dealing here with a man that went in with a group with a knife to rob a sick lady, and he was right there wanting to make some quick money out of the deal. That takes a mental state, and when you look at his juvenile record, there's something brewing there in your mind. You've got some criminal behavior in your mind to do that, to willingly go into someone's house with a group with somebody with a knife to make some quick money. That's not really a casual flirtation with crime. So I'm not real sure that you are amenable to corrections because of the circumstances of the offense. This thing was planned. You had time to think about it. You wanted to make some quick money. And you may have had no hesitation about going in this lady's house with someone armed with a knife and this lady's sick.

The circumstances of the offense is the next factor, and I've just stated those factors, those circumstances, and they're pretty outrageous, you know. A person's home is their castle. I don't know if this lady still feels comfortable at home, you know. If someone would go into anyone's home uninvited, a gang come in with a knife, I mean, are you always going to every night wonder if they're coming back or if someone else is coming in? How unsettling is that? So the circumstances of the offense.

....

The deterrence value to the accused, as well as to others; other people have to be deterred in this district, in this state, in this country that you don't go inside somebody's house with a gang with anybody, and to say it was a minor role and you went right on in with a gang with someone armed with a knife, that's more than a minor role. Other people – Everyone has to be deterred. We have to feel safe in our houses. I remember when I was a kid you'd leave your doors unlocked in this town, wouldn't lock your doors, didn't think a thing about it, never thought about it. Of course, that's more than forty years ago, but now you better keep your doors locked. So people have to be deterred. They have to know, and if the message gets out that Brandon Graham went in with a gang of guys armed with a knife to rob a lady that is sick with cancer, to steal her medication, and they didn't go to jail, nothing happened to them, then someone else will think, well, nothing will happen, we'll go to criminal court and nothing going to happen, they won't have to serve nothing, we beat that. That'll be the message.

Deterrence value to the accused as well as others. He may be deterred but there's – I think there's something more there than everybody – you just don't make some quick money, as his own statement says, going into someone's house. There's more – There's something more there. I mean, I deal with close to three thousand cases a year, and I've been doing this for twenty years, sat at that table, at the D.A.'s table (indicating) for eleven years, and on this (indicating) table for eight years and you see this. And when you've got someone that will have no hesitation about making quick money and going into a lady's house, there's something there.

Whether judicial diversion will send – serve the interests of the public as well as the accused, in this case I find that it will not serve the interest of the public. It may serve the interests of the accused, but I don't think it'll serve the interests of the public at large. It was – He was involved in a violent offense into someone's home and a diversion, judicial diversion, is denied.

I. JUDICIAL DIVERSION

On appeal, the defendant challenges the trial court's denial of judicial diversion, arguing that the court did not properly weigh the favorable evidence introduced on the defendant's behalf. The state counters that the trial court denied diversion based on the circumstances of the offense and that the record supports the trial court's decision.

A defendant is eligible for judicial diversion if he or she is convicted of a Class C, D, or E felony or lesser crime and has not previously been convicted of a felony or a Class A misdemeanor.

See T.C.A. § 40-35-313(a)(1)(B)(I). Judicial diversion allows the trial court to defer further proceedings without entering a judgment of guilt and to place the defendant on probation under reasonable conditions. T.C.A. § 40-35-313(a)(1)(A). When the probationary period expires, if the defendant has completed probation successfully, the trial court will dismiss the proceedings against the defendant with no adjudication of guilt. See T.C.A. § 40-35-313(a)(2). The defendant may then apply to have all records of the proceedings expunged from the official records. See T.C.A. § 40-35-313(b). A person granted judicial diversion is not convicted of an offense because a judgment of guilt is never entered. See T.C.A. § 40-35-313(a)(1)(A).

When a defendant challenges the manner of serving a sentence, this court conducts a de novo review of the record with a presumption that “the determinations made by the court from which the appeal is taken are correct.” T.C.A. § 40-35-401(d) (2003). However, when the accused challenges the trial court’s denial of a request for judicial diversion, a different standard of appellate review applies. Because the decision to grant judicial diversion lies within the sound discretion of the trial court, this court will not disturb that decision on appeal absent an abuse of discretion. State v. Electroplating, Inc., 990 S.W.2d 211, 229 (Tenn. Crim. App. 1998). Upon review, we will give the trial court the benefit of its discretion if “‘any substantial evidence to support the refusal’ exists in the record.” State v. Anderson, 857 S.W.2d 571, 572 (Tenn. Crim. App. 1992) (quoting State v. Hammersley, 650 S.W.2d 353, 356 (Tenn. 1983)).

In determining whether to grant judicial diversion, the trial court must consider (1) the defendant’s amenability to correction; (2) the circumstances of the offense; (3) the defendant’s criminal record; (4) the defendant’s social history; (5) the defendant’s physical and mental health; (6) the deterrence value to the defendant and others; and (7) whether judicial diversion will serve the ends of justice. Electroplating, Inc., 990 S.W.2d at 229; State v. Parker, 932 S.W.2d 945, 958 (Tenn. Crim. App. 1996). In addition, “the record must reflect that the court has weighed all of the factors in reaching its determination.” Electroplating, Inc., 990 S.W.2d at 229. If the trial court refused to grant judicial diversion, it should state in the record “the specific reasons for its determinations.” Parker, 932 S.W.2d at 958-59. The record reflects that the trial court engaged in a methodical review of each of the required factors and found that diversion was not appropriate in this case. The record contains substantial evidence to support the trial court’s determination. The trial court did not abuse its discretion in denying judicial diversion.

II. FULL PROBATION

The defendant contends the trial court erred by not sentencing the defendant to full probation. Defendant claims that the trial court improperly found enhancement factors that were not applicable to this case. Defendant claims that the trial court rejected mitigating factors that were clearly present. The state contends the trial court properly denied the defendant full probation.

In denying the defendant full probation, the trial court stated,

Well, you chose to participate in a violent offense, going into someone’s house. You chose to do that. And other people have to

be deterred. They have to know that you just don't do that, not as far as I'm concerned. So I'm denying your judicial diversion.

How you'll serve it, you've got three years, thirty percent release eligibility. . . . [T]here's your [juvenile] record. I don't like doing this. I wish I was like the Maytag repairman and sit around here and not worry about it but, I mean, crime is outrageous in Morristown and it's, I mean, it's getting out of control. . . . This is not little stuff. This is stuff like what you're doing. It's outrageous here. This is not the town I grew up in. And you chose to be involved in this offense and you're a big boy. You could have said, no, I don't want to do that but, instead, you said, I want the quick money. You made that decision. You're going to have to live with it.

When determining if confinement is appropriate, the trial court should consider whether (1) confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct, (2) confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to people likely to commit similar offenses, or (3) measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant. T.C.A. § 40-35-103(1)(A)-(C). The trial court may also consider a defendant's potential or lack of potential for rehabilitation and the mitigating and enhancement factors set forth in Tennessee Code Annotated sections 40-35-113 and -114. T.C.A. §§ 40-35-103(5), -210(b)(5); State v. Boston, 938 S.W.2d 435, 438 (Tenn. Crim. App. 1996). The sentence imposed should be the least severe measure necessary to achieve the purpose for which the sentence is imposed. T.C.A. § 40-35-103(4).

When a defendant is an especially mitigated or standard offender convicted of a Class C, D, or E felony, the defendant should be considered as a favorable candidate for alternative sentencing in the absence of evidence to the contrary. T.C.A. § 40-35-102(6). When the defendant is presumed to be an eligible candidate, the state can overcome the presumption with "evidence to the contrary." Id. Here the defendant is presumed to be a favorable candidate for alternative sentencing based upon his Class C and Class E felony convictions. However, the burden is on the defendant to establish that he is suitable for total probation and "that probation will be in the best interest of the defendant and the public." State v. Ring, 56 S.W.3d 577, 586 (Tenn. Crim. App. 2001) (citing State v. Baker, 966 S.W.2d 429, 434 (Tenn. Crim. App. 1997)).

The defendant avers that the trial court did not properly consider the defendant's relevant conduct in the commission of the offense in determining that the conduct may have threatened serious bodily injury and in determining whether the defendant played a minor role in the offense. The defendant contends that the trial court did not properly consider the defendant's statement immediately following his arrest admitting his own involvement and telling the authorities of his codefendants' involvement as assisting authorities in uncovering those individuals who were involved in the offense.

The record reflects that the trial court considered the defendant's role in and conduct during the offense and his admission of guilt to the authorities but found that the need to avoid depreciating the seriousness of the offense outweighed any favorable consideration due these other factors. The defendant went with a group into the home of a sick woman after gaining access by false pretenses. The woman was held at knifepoint by one of the co-defendants while the defendant and another co-defendant searched her house for pills. The defendant had prior juvenile adjudications and had served both formal and informal probation as a juvenile. We conclude that he has not satisfied his burden of proving that he is entitled to full probation. The trial court properly denied full probation.

Based on the foregoing and the record as a whole, we affirm the judgments of the trial court.

JOSEPH M. TIPTON, PRESIDING JUDGE